United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ATAKA & CO., LTD.,
Plaintiff-Appellant and Cross-Appellee,

against

DERRICK BARGE HOWLETT NO. 18, its engines, boilers, etc., M.P. HOWLETT INC., and EDWARD WITHAM,
Defendants and Third-party Plaintiffs-Appellees and Cross-Appellants,

against

ISTHMIAN LINES, INC., STATES MARINE-ISTHMIAN AGENCY, INC., MAHER STEVEDORING COMPANY, INC., and INTERNATIONAL CARGO GEAR BUREAU, INC.,
Third-party Defendants,

and

THE HOME INSURANCE COMPANY,
Third-party Defendant and Fourth-party Plaintiff,

against

FIREMAN'S FUND INSURANCE COMPANY,
Fourth-party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CROSS-APPELLEE AND REPLY BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR CROSS-APPELLEE

Question Presented on Cross Appeal

Were there issues of fact precluding the application of the doctrine of Res Ipsa Loquitur and warranting the denial of plaintiff's motion for summary judgment.

POINT I

The Court below properly granted summary judgment against cross-appellants because no material issue of fact was raised.

In postulating the issue on cross appeal M. P. Howlett Inc. and Derrick Barge Howlett No. 18, included matters which were not raised in the District Court in opposition to the motion and for which is no support in fact. Firstly, they presume the proximate cause of plaintiff's loss was the negligence of third parties defendant Maher Stevedoring Company Inc. and/or Isthmian Lines Inc.

On this issue the Court is referred to the matter as presented to the District Court in the affidavit in opposition to the motion (A37). At no place in that affidavit can a denial of negligence be found on the part of cross appellant. As a matter of fact it is conceded by cross appellant that the operator of the Derrick Barge No. 18, Edward Witham, initiated the loading of plaintiff's cargo on the derrick barge for the testing. The crane operator in his own statement indicated in response to the request by the dock boss that he place the plaintiff's cargo on a stock boat, "I told Charles Lewis that it could wait till Monday when I returned from testing the Howlett and I would then put the cargo on the Hughes 48" (A28).

The Court will note that in addition to not denying negligence in opposition to the motion for summary judgment

cross appellant set forth four issues of fact that it considered warranting denial of the motion (A41), but each of these issues set forth were not material to the issue before the Court and concern the cross appellants' third party actions for indemnity only. They were not relevant to the motion.

Mr. E. H. Johanson who witnessed the test of the lifting capacity of the crane for the purpose of certification at the time the cargo was lost overboard testified that he brought the presence of the cargo on the derrick barge to the attention of Mr. Witham prior to conducting the test because it's "common knowledge that the barge will list during the course of the test and in fact the cargo did move overboard" at the time the barge was in a listed condition (A11). Accordingly, as between the barge and plaintiff, the barge is responsible for its loading, 1926 A.M.C. 1019, *Walter B. Pollock* (U.S.D.C.—S.D.N.Y.). The engineer in charge of the barge (Witham) did not protest the method of loading for the test that he knew the barge would be subjected to, which protest would reasonably be expected of him so as to cast the burden on the stevedore where cross appellant now claims it to exist. *S. C. Loveland Co. Inc.* v. *Lavino Shipping Company, et al.*, 37 F. Supp. 386 (E.D. Pa.), 1939 A.M.C. 1323.

Accordingly, the District Court properly granted summary judgment against cross appellants allowing them to pursue their third party claims (A51). There is no issue of vicarious liability between the parties to this appeal. The case of *Krawill Machinery Corp.* v. *Robert C. Herd,* 145 F. Supp. 554 (D. Md. 1956) is not applicable since the record fails to disclose negligent instructions by the dock boss or indeed any instructions at all.

REPLY BRIEF OF PLAINTIFF-APPELLANT

POINT II

The Court below was in error in holding M. P. Howlett Inc. and Derrick Barge No. 18 entitled to the Bill of Lading Limitation of Liability.

(A)

The barge owner argued in the Court below that it was an intended beneficiary of clause 3 of the bill of lading contract entered into between plaintiff appellant and Isthmian Lines, Inc. The introductory language of clause 3 clearly demonstrates the intention of the parties:

> "Because Carrier requires persons and companies to assist it in the performance of all work and services *undertaken by it* in connection with the cargo described herein as well as the cargo of others transported by Carrier, it is expressly agreed between the parties hereto that the . . . contractors, stevedores, . . . and others *used, engaged or employed by Carrier in the performance of the aforesaid work and services of the Carrier,* shall be a beneficiary of this contract . . . ." (A36).

The Court clearly indicated in the opinion of the District Court that the only way in which this language could be applicable to the derrick barge owner would be if the voyage began when the cargo was placed on the barge (A43), because certainly the testing of the crane for certification by the Department of Labor and the use of the crane away from Isthmian's terminal was specifically excluded by the agreement beween M.P. Howlett Inc. and Isthmian Lines Inc. (A23).

The Court will note that while the appellee urges the conclusion of the District Court was correct it does not support the reasoning of the Court as to when the voyage begins which was so imperative to its conclusion.

Rather appellee makes the same argument which was unsuccessful in the District Court citing those cases in which the language of the bill of lading coincided with the event giving rise to the controversy, and attempts to distinguish this Court's rationale in *Cabot Corporation* v. *S.S. Mormacscan,* 298 F. Supp. 1171 (S.D.N.Y., 1969), affd. 441 F. 2d 476 (2nd Cir., 1971). It is submitted there is a distinction without a difference and the judicial policy of restricting limitation from liability to the "clearly" intended beneficiaries must govern a dispute of this nature. *The Boston Metals Co.* v. *The Winding Gulf,* 349 U.S. 122, *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85.

The import of appellant's answer to the Court is that because the floating derrick would have been entitled to the bill of lading limitation of liability had it dropped appellant's cargo during the course of performing work for Isthmian Lines at this Isthmian Lines terminal in putting the cargo on board the stock boat or the SS STEEL ADMIRAL, it should be able to claim the benefit of the same limitation even though it used appellant's cargo to aid its stability during the testing of its crane on its own "frolic and detour," which was expressly excluded as a responsibility of Isthmian Lines in its charter of the derrick barge (A23).

The District Court could not accept this construction of the contract and it is urged that this Court similarly reject it.

(B)

Nothing further can be said as to when the voyage commenced in answer to appellant's brief because appellee

does not support the District Court's reasoning or contend that this was simply a permissible geographical deviation.

The cargo owner agrees that its argument that the stowage on the deck of the derrick barge is an afterthought which was not raised below, but it was not suggested below by appellee that the voyage began when the cargo was placed on its barge nor was it suggested from a review of the law memoranda or affidavit in opposition to the motion that the derrick barge was a "carrier". If appellee purports to be a "carrier" then under the terms of the under deck bill of lading issued these obligations required under deck stowage and no case has been cited to indicate that the absence of under deck spaces minimizes a carrier's obligation. Even *DuPont de Nemours International, S.A.* v. *S.S. Mormacvega,* 1974 A.M.C. 67 (2nd Cir., 1974), not yet otherwise reported, turned on the proof that it was safe to carry containers on the deck of a specially designed container vessel.

It is of no more consequence to say here that the barge had no under deck spaces and hence is permitted to carry on deck (assuming it to be a carrier) than it was in the argument made to the 5th Circuit in *Searoad Shipping Company* v. *E. I. Dupont P. deNemours & Company, Incorporated,* 361 F. 2nd 833, that under deck stowage would violate Coast Guard regulations.

(C)

Appellee argues that Derrick Barge Howlett No. 18 is clearly a substitute carrier in order to bring it within the vessel's *in rem* limitation of liability. This argument is fatuous in the light of appellee's affidavit in the District Court stating, "the derrick barge was non-self-propelled and consisted of a crane mounted on a floating platform" (A38).

England's Court of Appeal (1926) in *Merchants Marine Insurance Company Ltd.* v. *North of England Protecting & Indemnity Association,* 26 Ll. L. Rep. 201, held a floating

crane was not a ship or a vessel entitled to a limitation of liability. But certainly there is nothing to indicate to the Court that this derrick is a carrier as alleged since it did not enter a contract of carriage, it had no power of its own and as appellant points out it had no under deck cargo spaces.

The cases relied upon by appellee do not support the proposition that this floating platform is a substituted carrier. In *Bulkley* v. *Naumkeag Steam Cotton Co.*, 65 U.S. (24 How.) 386, 391 (1860) it was a common practice because of a bar at the mouth of Mobile Bay for vessels to receive cargo from lighters after clearing the bar since otherwise they would be too deeply ladened. Carriage by lighters was customary and part of the transportation of the goods at that port. *Fyfe* v. *Pan-Atlantic S.S. Corp.*, 114 F. 2nd 72 (2d Cir. 1940) again involved the use of lighters to transport cargo between vessels, but lighters are designed to transport cargo. *Federal Insurance Co.* v. *United States*, 60 F. 2nd 46 (2d Cir., 1932) involved a passenger vessel and *Colton* v. *N.Y. & Cuba Mail S.S. Co.*, 27 F. 2d 671 (2d Cir., 1928) involved lighters used to transport cargo. None of these cases substantiate appellee's contention that Derrick Barge Howlett No. 18 is a substituted carrier within the meaning of paragraph 1 of the bill of lading, so as to give the derrick barge the *in rem* limitation of liability afforded to the "carrier".

It is interesting to note Appellee's answer to the argument based on *Carbon Black Export, Inc.* v. *SS Monrosa*, 79 S. Ct. 710, 359 U.S. 180 rejecting a contractual immunity *in personam* being claimed by a vessel *in rem* is *The City of Norwich*, 118 U.S. 468 (1886) involving limitation of liability and *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249 (1943) involving the Fire Statute. These cases involved the Limitation of Liability Act, 9 Stat. 635 (1851), 46 U.S.C.A. §§ 181-189 whereby the shipowner may restrict his liability as to *The City of Norwich*. *Gilmore and Black*, in the

Law of Admiralty (1957) commented at page 713:

> "By a 5-4 majority the Court, through Justice Bradley, held that 'interest' did not include insurance, so that the proceeds need not be surrendered by the shipowner. Justices Miller, Harlan, Matthews and Gray published a vigorous dissent. In view of the confusion of the Continental authorities, looked to as sources of 'general maritime law', the absence of any indication of what the legislative intent may have been in 1851, and the blank ambiguity of the Limitation Act itself, the holding in the three cases might be described, in current terminology, as a policy decision, vaguely shored up in the majority opinion by makeweight speculations as to the 'nature' of property insurace (a 'collateral contract', 'personal to the insured', of 'indemnity merely', which 'does not attach itself to the thing insured, nor go with it when it is transferred'). In essence all that can be said of the cases is that five justices felt that allowing the shipowner to retain the proceeds of insurance was wise and statesmanlike, and that four justices did not."

But perhaps a more appropriate explanation of these two cases plus *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960) can be found in the fact that the Courts were construing statutes about which Chief Justice Taft wrote in *Hartford Accident & Indemnity Company* v. *Southern Pacific Company et al.*, 273 U.S. 207, 214 (1927):

> "These decisions establish, first, that the great object of the statute was to encourage shipbuilding and to induce the investment of money in this branch of industry, by limiting the venture of those who build the ship to the loss of the ship itself or her freight then pending, in cases of damage or wrong, happening without the privity or knowledge of the ship owner, and by the fault or neglect of the master or other persons on board; that the origin of this pro-

ceeding for limitation of liability is to be found in the general maritime law, differing from the English maritime law; and that such a proceeding is entirely within the constitutional grant of power to Congress to establish courts of admiralty and maritime jurisdiction, Norwich v. Wright, 13 Wall. 104; that to effect the purpose of the statute, Admiralty Rules Nos. 54, 55, 56 and 57 (now 51-54; see 254 U.S. Appendix, p. 25,) were adopted by which the owner may institute a proceeding in a United States District Court in admiralty against one claiming damages for the loss, in which he may deny any liability for himself or his vessel, but may ask that if the vessel is found at fault his liability as owner shall be limited to the value of the vessel, as appraised after the occurrence of the loss, and the pending freight for the voyage; that these damages shall include, damages to goods on board, second, damages by collision to other vessels and their cargoes, and, third, any other damage or forfeiture done or incurred; that all others having similar claims against the vessel and the owner may be brought into concourse in the proceeding, by monition, and enjoined from suing the owner and vessel on such claims in any other court; that the proceeding is equitable in its nature and is to be likened to a bill to enjoin multiplicity of suits, Providence Steamship Co. v. Hill Manufacturing Company, 109 U.S. 578; that, by stipulation after appraisement, the vessel and freight may be released and the stipulation be substituted therefor; that, on reference to a commissioner and the coming in of his report, it shall be determined, first, whether the owner and his vessel are liable at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between the claimants. The cases show that the court may enter judgment in personam

against the owner as well as judgment in rem against the res or the substituted fund, City of Norwich, 118 U.S. 468, 503; that the fund is to be distributed to all established claims to share in the fund to which admiralty does not deny existence, whether they be liens in admiralty or not, The Hamilton, 207 U.S. 398, 406; and that they may include damages from a collision, from personal injuries, Butler v. Boston Steamship Co., 130 U.S. 527, or for wrongful death, if arising under a law of Congress, a State of the Union or a foreign state, which is applicable to the owner and the vessel. The Bourgogne, 210 U.S. 95, 138.

"It is quite evident from these cases that this Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. Dowdell v. United States District Court, 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings in rem against the ship as well as to proceedings in personam against the owner, the limitation extending to the owner's property as well as to his person. The City of Norwich, 118 U.S. 468, 503. * * *"

As a matter of fact the *Continental Grain Company* case while dealing with the practicalities of transferring actions contains a vigorous dissent by Mr. Justice Whittaker joined by Mr. Justice Douglas affirming the distinction between *in rem* and *in personam* remedies in the fol-

lowing words:

> "* * * Indeed, the absence of liability of the owner of a vessel does not necessarily exonerate the vessel itself. If, for example, a vessel under bareboat charter damages another as the result of the negligence of her crew, the vessel is liable in rem even though an action in personam would not lie against her owner. Likewise, the right of one damaged by the wrong of a vessel to proceed against her follows her into the hands of an innocent purchaser, although the latter is not liable in personam. Similarly, a vessel is liable in rem for damages resulting from her negligent operation by an independent pilot to whose control the law required her to be confined, although her owner is not liable in personam. The cases cited by the Court, holding that in expressly exonerating by statute shipowners from certain liabilities for casualty losses of cargo at sea, Congress similarly intended to exonerate their property, i.e., their ships, from such liabilities, are wholly inapposite. They involved only interpretation of particular statutes, and did not at all deal with, and certainly were not intended to destroy, for they expressly recognized, the historic difference and distinction between admiralty actions in personam and those in rem. Nor does this Court's Admiralty Rule 54, discussed by the Court, touch the question of transferability of this case. This is not a limitation of liability proceeding, specially covered by that Rule, and the parties make no such claim. Rather we have here only a simple motion to transfer a 'civil action' from one District to another, and such a motion is exclusively governed by § 1404(a). * * *" (364 U.S. 39)

(D)

It is true that the plaintiff's recovery would have been limited to $500 if the loss was attributable to Isthmian

Lines under a breach of its contract of carriage or negligence by stevedores performing services contracted by Isthmian Lines. It is clear that the cargo owner was willing to risk a loss under these circumstances.

However, the likelihood of loss during the "normal" course of transit is self-evidently more remote than that resulting from an errant derrick barge using plaintiff's cargo for "stability" while testing the lift capacity of its crane.

The argument that the shipper had the option to declare the value of his cargo in the bill of lading in order to protect against losses in excess of $500 has no validity at all and as this Court has pointed out would have no more validity had the decision gone the other way. *Leather's Best, Inc.* v. *SS Mormaclynx,* 451 F.2d 800, 816 (1971).

CONCLUSION

1. The lower court's granting of summary judgment against defendants M. P. Howlett, Inc., and Derrick Barge Howlett No. 18 should be affirmed.

2. The lower court's denial of plaintiff's motion to strike defendants' package limitation defense should be reversed.

3. The lower court's decision that defendants M. P. Howlett, Inc. and Derrick Barge Howlett No. 18 are entitled to the benefits of the $500 package limitation should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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ATAKA &CO., LTD.,

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DERRICK BARGE HOWLETT NO. 18, its engines, etc., M. P. HOWLETT INC. and EDWARD WITHAM,

Defendants and Third-Party Plaintiffs Appellees and Cross-Appellants

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ISTHMIAN LINES, INC., et al.,

Third-Party Defendants.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 23rd day of July, 1974, he served two copies of Brief for Cross-Appellee and Reply of Appellant on Thacher, Proffitt & Wood, Esqs., the attorneys for Defendants and Third-Party Plaintiffs-Appellees and Cross-Appellants by delivering to and leaving same with a proper person in charge of their office at 40 Wall Street in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
23rd day of July, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976